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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SPENCER CHO,

Defendant and Appellant.

E049243

(Super.Ct.No. RIF145735)

OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed.

Amanda F. Benedict for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Charles Ragland and Gary W. Brozio, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant guilty of attempting to willfully commit a lewd or lascivious act upon a child under the age of 14 years. (Pen. Code, §§ 664, 288, subd.

(a).)¹ The trial court granted defendant 36 months of formal probation, with the condition that he serve 180 weekend days in the custody of the county sheriff. Defendant raises two contentions. First, defendant contends that the evidence supporting his conviction does not meet the substantial evidence standard. Second, defendant asserts that the trial court erred by denying his motion to suppress the transcripts of his online chats. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Perverved Justice is an organization wherein adults create online profiles of 13 or 14 years olds, and use those profiles in internet chat rooms to find adults that solicit children online. Perverved Justice operates as follows: If an adult contacts the supposed teenager online, and the chat becomes sexual in nature, then the Perverved Justice volunteer gives the adult a residential address where the adult can go to supposedly meet the teenager. The residential address will correspond to a decoy house selected by police. If the adult agrees to meet the supposed teenager at the decoy house, then the Perverved Justice volunteer gives the transcript of the online chat conversation to the police. The police then monitor the decoy house, and patrol the neighborhood around the decoy house, while waiting for the adult to arrive.

Amanda was a volunteer for Perverved Justice. Amanda posed as a 13-year-old girl in Yahoo.com chat rooms. Amanda's screen name was "Ash_luvs_math." Amanda's profile included three photographs of a teenager. Yahoo.com does not allow

¹ All further statutory references are to the Penal Code unless otherwise indicated.

people under the age of 18 to enter their chat rooms. In order to clarify that she was 13, rather than 18 or older, Amanda wrote “I’m really 13 not 18” on her Ash_luvs_math profile, and listed her age as 130 years old.

On January 7, 2008, Amanda used her Ash_luvs_math profile to enter the California romance chat room on the Yahoo.com website. The California chat room is designed for people in a specific regional area to meet online. Defendant, with the screen name “caspersc78,” initiated contact with Amanda in the California romance Yahoo.com chat room.

At the start of the chat conversation, defendant identified himself as a 21-year-old male in Los Angeles. Amanda identified herself as a 13-year-old female in Mira Loma. Defendant asked Amanda why she was in an adult chat room, and she explained that there were no chat rooms for teenagers. Defendant asked Amanda what she was wearing, and specifically asked what type of panties she was wearing. Defendant asked Amanda if she was looking for a boyfriend, and what grade she was in. Amanda said she did not know if she was looking for a boyfriend, and that she was in the seventh grade. Defendant asked if Amanda was a virgin, and she confirmed that she was a virgin.

As the chat conversation progressed, defendant asked Amanda if she had ever tried getting drunk. Amanda responded that she had gotten drunk with her ex-boyfriend. Defendant asked if Amanda’s ex-boyfriend took advantage of her while she was drunk. Amanda explained that her ex-boyfriend did not take advantage of her; however, she kissed or “made out” with her ex-boyfriend. Defendant wrote that he was

surprised Amanda's ex-boyfriend "didn't grab [her] boobs." Defendant asked Amanda if there were "any positions [she] wan[t]ed to try out." Amanda said she did not know any positions, so defendant described various sexual positions.

Defendant asked Amanda, "[Y]ou[']re not curious how a dick feels in [you]?" Defendant wrote, "[Y]our pussy wraps around it tightly as it slides in and out." Defendant encouraged Amanda to masturbate. Defendant instructed Amanda to place her finger inside her vagina, and "slide it in and out." Amanda responded that she tried masturbating as defendant instructed, but that it felt "weird." Defendant assured Amanda that he "know[s] how to move [his] finger in a girl." Defendant also explained that Amanda would "prob[ably] scream in pleasure" if he performed oral sex on her.

Defendant wrote to Amanda, "[Yo]u sound curious." Amanda responded, "[N]ow that [yo]u told me [a]bout it it sounds [c]ool." Defendant suggested that Amanda try "it" with him. Amanda wrote, "[B]ut [you're] not here silly." Defendant responded, "[I] have a car." Defendant explained that he "could teach and show [Amanda] a lot." Amanda wrote, "[M]aybe some day," and defendant asked, "[W]hen?" Amanda told defendant that her mother was out of town for the weekend, if defendant wanted to come to her house. Defendant asked Amanda what they would do if he came to visit her. Amanda responded, "[L]ike all the stuff we talked about." Defendant wrote, "Then [yo]u won't be a virgin if we do everything." Amanda explained that it was okay if they had sex because defendant seemed "re[a]lly nice."

Defendant asked Amanda if she had a cell phone. Amanda explained that she did not have a cell phone, but she had a calling card, so she could call defendant.

Defendant asked Amanda for her address. Amanda agreed to give defendant her address, if defendant gave her his telephone number. The information was not exchanged, but defendant again asked Amanda when she wanted to meet. Amanda turned the question around, and asked defendant when he wanted to meet. Defendant responded, “[A]nytime I don’t have to see your parents.” Amanda reminded defendant that her mother was gone for the weekend, and she suggested that he come to her house that night, at midnight. Defendant expressed concern, writing, “a 13 and 21 [year old] alone at midnight can sound bad to other people.” Defendant asked Amanda to call him, and he gave Amanda his telephone number.

Another member of Perverted Justice, the phone verifier, contacted defendant on the telephone. After the phone conversation, defendant began chatting with Amanda again on the internet. Defendant asked Amanda for her address. Amanda gave defendant the address of the decoy house in Mira Loma, where the police were conducting a sting operation. Defendant expressed concern that Amanda may be working with the police. Amanda told defendant that she was not working with the police. Amanda asked defendant to email her photographs of him. Defendant emailed Amanda the photographs. Defendant asked Amanda to call him again. The Perverted Justice phone verifier placed the phone call to defendant.

The Riverside County Sheriff’s Department had deputies patrolling the neighborhood around the decoy house, and there were deputies in a motor home that was parked in the driveway of the decoy house. Riverside County Sheriff’s Lieutenant Bianco was one of the law enforcement officers in the motor home. The sting operation

in the instant case took place over the course of three and a half days. When defendant arrived at the decoy house in his car, another suspect was already inside the decoy house, and a second suspect was walking down the sidewalk. Lieutenant Bianco recognized defendant from the photographs that defendant sent to Amanda, and because the vehicle defendant was driving matched the vehicle description that defendant had given to Amanda—a Toyota 4Runner. Lieutenant Bianco initially spoke to defendant while defendant was in his car, due to the two other suspects that were in the immediate area.

Riverside County Sheriff's Investigator Johnson was involved with defendant's arrest. Investigator Johnson searched defendant's person and found a single unopened condom packet in defendant's pocket. In the front passenger area of defendant's car, Investigator Johnson found a Google.com map with directions to the decoy house, and a box of condoms containing two unopened condom packets.

DISCUSSION

A. SUBSTANTIAL EVIDENCE

Defendant contends that the evidence supporting his conviction does not meet the substantial evidence standard. Defendant's argument specifically focuses on the attempt element of a direct but ineffectual act done towards the commission of the crime. We disagree with defendant's contention.

"A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of

solid value upon which a reasonable trier of fact could have relied in reaching the conclusion in question.” (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

“The crime of attempt requires two elements: ‘a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.’ [Citation.]”

(*People v. Reed* (1996) 53 Cal.App.4th 389, 398 (*Reed*) [Fourth Dist., Div. Two].)

“““Although mere preparation such as planning or mere intention to commit a crime is insufficient to constitute an attempt, acts which indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design will be sufficient. [Citations.]”” [Citations.]” (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1385-1386.) In *Reed*, this court concluded that the defendant took a direct but ineffectual act towards the crime of molestation when he arrived at a motel room with sex toys and lubricant, even though a police sting operation was in place and no children were in the motel room. (*Reed*, at p. 393-395, 399.)

In the instant case, defendant had a sexually explicit online conversation with Ash_luvs_math. Defendant drove from Los Angeles to the decoy house, in Mira Loma. In defendant’s vehicle, he had directions from Los Angeles to the decoy house, as well as two unopened condom packets in the condom box. Defendant also had a single unopened condom packet on his person. Defendant’s acts of (1) driving to the decoy house, and (2) removing a condom from the box and placing it in his pocket, go beyond merely preparing for the crime. These two acts show an unambiguous intent to commit the molestation, because (1) defendant drove a considerable distance to the decoy house, which reflects his determination to meet with Ash_luvs_math; and (2) there was no

need to remove the condom from the box and place it in his pocket, if he did not intend to engage in sexual relations with Ash_luvs_math. In sum, defendant's actions reflected immediate steps in the execution of the molestation. Consequently, we conclude that substantial evidence supports defendant's conviction.

Defendant contends that substantial evidence does not support his conviction because he never left his car. We do not find defendant's argument persuasive because, as set forth *ante*, there is substantial evidence in the record showing that defendant took immediate steps in executing the offense of committing a lewd and lascivious act upon the body of Ash_luvs_math.

B. CHAT TRANSCRIPT

Defendant contends that the trial court erred by denying his motion to suppress the transcript of the online conversation between defendant and Ash_luvs_math.

Defendant contends that the chat conversations were recorded without his consent, and therefore, are inadmissible. (§ 632, subd. (d).) We disagree.

Section 632, subdivision (a), prohibits a person from intentionally recording a confidential communication, if the person has not obtained the consent of the parties involved in the communication. Subdivision (d) of section 632 prohibits evidence obtained in violation of subdivision (a) from being used as proof in any action or prosecution, except for the prosecution of violating subdivision (a).

When a trial court rules on a motion to suppress evidence, it ““(1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is

not violated. [Citations.] . . . The court’s resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard.

[Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review.” [Citation.]’ [Citations.]” (*People v. Carter* (2005) 36 Cal.4th 1114, 1140.)

In this case, defendant is contending that the trial court erred by finding that the Yahoo.com chat transcripts did not fall within the confidentiality protections provided by section 632, which concerns the third step of the trial court’s analysis, i.e., application of the law. As a result, we apply the independent standard of review.

In a recent opinion, *People v. Nakai* (2010) 183 Cal.App.4th 499, 518-519, this court concluded that Yahoo.com chat conversations do not qualify as confidential communications for purposes of section 632, in part, because (1) Yahoo.com’s privacy policy indicates chat dialogues may be shared; (2) Yahoo.com warns users chat dialogues can be archived, printed, and saved; and (3) the defendant was chatting online with a person whom he did not know, who could have easily shared the communication with countless others via the internet. *Nakai* was filed approximately two weeks after defendant filed his opening brief in this matter. The People cited *Nakai* in their respondent’s brief, in support of the argument that defendant’s communications with Ash_luvs_math were not confidential. Defendant did not file a reply brief.

It appears that Yahoo.com's privacy policy was not incorporated into the instant record. Nevertheless, defendant was chatting online with a person whom he did not know. As in *Nakai*, defendant could not have reasonably expected the stranger with whom he was chatting to keep the communication confidential. (*Nakai, supra*, 183 Cal.App.4th at p. 518.) In sum, we find *Nakai* controlling on this issue, and we have not been presented with an argument persuading us that *Nakai* is inapplicable.

DISPOSITION

The judgment is affirmed.

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/s/ MILLER
J.

We concur:

/s/ RAMIREZ
P. J.

/s/ KING
J.